

## NOTES

### **The Americans With Disabilities Act and Law School Accommodations: Test Modifications Despite Anonymity**

*“In recent years, individuals with learning disabilities have become embroiled in a tug-of-war with members of the legal profession about academic accommodations. Since the implementation of the Americans with Disabilities Act, record numbers have come forward claiming to suffer from a disability. Law students in particular have comprised a large number of those making the assertion.”*<sup>1</sup>

#### I. INTRODUCTION

Title III of the Americans with Disabilities Act (ADA) mandates that law schools provide reasonable accommodations to those students having disabilities under the Act.<sup>2</sup> Accommodating students during the examination period, however, has proved controversial in law school environments predominantly characterized by fierce competition and pressure among its students.<sup>3</sup> With starting salaries for new associates as high as \$145,000, plus other bonuses for federal clerkship experience or other specialization, one can understand why.<sup>4</sup> It should be a given that the ADA serves an admirable and necessary purpose in the law.<sup>5</sup> However, are exam accommodations for some

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1. See Scott Weiss, *Contemplating Greatness: Learning Disabilities and the Practice of Law*, 6 SCHOLAR 219, 220 (2004).

2. 42 U.S.C. § 12181(7)(J) (2005) (describing facilities required to accommodate people with disability). Title III prohibits discrimination by private institutions with places of public accommodation such as undergraduate and postgraduate private schools. *Id.*

3. See, e.g., Freedley Hunsicker, *Learning Disabilities, Law Schools and The Lowering of the Bar*, 42 S. TEX. L. REV. 1, 15-16 (2000) (arguing test accommodations detrimental to quality of legal professional standards); Donald Stone, *The Impact of the Americans With Disabilities Act On Legal Education And Academic Modifications for Disabled Law Students: An Empirical Study*, 44 U. KAN. L. REV. 567, 567 (1996) (noting challenge law schools face in applying ADA fairly); Weiss, *supra* note 1, at 226-27 (acknowledging test accommodations raise perplexing issues given importance of first year grades in law school).

4. Ashbey Jones, *New York Salary Dance*, WALL STREET JOURNAL ONLINE (Feb. 15, 2006), <http://blogs.wsj.com/law/2006/02/15/the-new-york-salary-dance/>. One's first year salary is largely determined by his or her law school performance and grades. Weiss, *supra* note 1, at 226 (noting law firms traditionally extend summer clerkship offers based on first year grades).

5. See 42 U.S.C. § 12101(b)(2) (2005) (stating ADA's goal to "provide clear, strong, consistent,

students fair when the very assessment of professional ability is predicated on equality through anonymity during testing procedures?

Under the ADA, a person is disabled if he has a physical or mental impairment that substantially limits a major life activity.<sup>6</sup> Learning, reading, and working all qualify as major life activities and are, therefore, covered under the Act.<sup>7</sup> Controversy, however, surrounds interpretation of the substantial limitation requirement.<sup>8</sup> For example, the Federal Circuit Courts are split on whether Title I, which controls employment discrimination, should also apply in determining whether a law student is substantially limited in his or her ability to function in law school.<sup>9</sup>

Assuming that the student is disabled and qualifies for testing accommodations, should his or her grades be represented to employers as having taken exams similarly situated to all other students?<sup>10</sup> As noted earlier, competition among law students is fierce and jobs are limited.<sup>11</sup> Do legal employers have an interest in knowing whether a potential job applicant took his examinations under extended time?<sup>12</sup> Should they care?<sup>13</sup> Is such anonymity, despite extended time, fair to other law students trying to get jobs as associates?<sup>14</sup> Are these accommodations legal under the Americans With Disabilities Act?

This Note analyzes the issues that arise when ADA student accommodations are provided in post-graduate institutions, focusing specifically on law school.<sup>15</sup> Part II of this Note discusses the relevant history and caselaw that has grown around interpretation of the Act, and the facts surrounding its effects and occurrence in law schools.<sup>16</sup> Furthermore, Part III compares the various judicial standards in determining whether accommodations should be granted to student petitioners, or stated alternatively, whether the Court will apply Title

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enforceable standards" dealing with discriminatory practices).

6. 42 U.S.C. § 12102(2) (2005) (providing standard).

7. See 28 C.F.R. § 36.104 (2002) (including "learning" and "working" as major life activities). The Department of Justice, assigned by Congress to write regulations for Title III of the ADA, defines "physical or mental impairment" as including "specific learning disabilities." 28 C.F.R. § 36.104(2).

8. Compare *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 631 (6th Cir. 2000) (rejecting petitioner's request to apply Title I standard), with *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93-CV-4986, 2001 WL 930792, at \*44 (S.D.N.Y. Aug. 15, 2001) (applying Title I standard in determining petitioner substantially limited in reading and working).

9. See *supra* note 8 (comparing circuit split); *infra* Part III.A (analyzing circuit split with respect to applicable standard for petitioner to bring suit under ADA).

10. See *infra* Part III.C (exploring employer's interest in disclosure of testing circumstances).

11. See *supra* note 3 and accompanying text (noting fierce competition among law students).

12. See *infra* Part III.C (exploring employer's interest in disclosure of testing circumstances).

13. See *infra* Part III.C (explaining rationale behind employer's interest in disclosure of testing accommodations). An interesting related issue beyond the scope of this Note may be whether the employer could ask about a learning disability during an interview.

14. See *infra* Part III.C (discussing interests of other law students).

15. See *infra* Part III (evaluating effect of ADA accommodations on law schools and students).

16. See *infra* Part II (describing history, case law, and implementation).

I or Title III of the Act to the student petitioner's claim.<sup>17</sup> Part III goes on to discuss the other various interests affected when testing accommodations are granted, such as the employer's interest during the hiring process and whether disclosure of testing modifications should be made by the law school.<sup>18</sup>

This Note argues that when courts determine whether students are substantially limited in law school for purposes of the ADA, the proper standard should be a comparison to other people who are also in law school.<sup>19</sup> This Note rejects the theory that a comparison should be made to the general population, because the effect would likely bar many legitimately disabled students who wish to pursue a legal career and are good for the legal profession and its clients.<sup>20</sup> In zealously advocating for such disability interests, however, we must consider the interests of other affected parties including the employers, the disabled student's peers, and the legal profession.<sup>21</sup> This Note ventures to explore these issues and to articulate justifications and solutions to support and address them.<sup>22</sup> Namely, that it is the law school's duty and obligation to implement the federal mandate fairly, perhaps through an appointment of special counsel within the law school administration.

## II. HISTORY

### A. Creation of the Americans With Disabilities Act of 1990

The principal purpose of the Americans with Disabilities Act of 1990 (ADA) is, "to provide clear, strong, consistent, enforceable standards" that deal with discrimination against those with a disability.<sup>23</sup> In passing the ADA, Congress found that Americans with disabilities are often relegated to positions of political powerlessness and lack legal recourse to combat discrimination that results from stereotypical attitudes held toward their class.<sup>24</sup> Moreover, the

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17. See *infra* Part III (comparing Federal Circuit Court split).

18. See *infra* Part III.C (discussing various interests implicated when students receive testing accommodations).

19. See *infra* Part III.A (asserting *Bartlett* standard should apply).

20. See *infra* Part III.A (arguing *Gonzales* standard acts as bar to students with disabilities).

21. See *infra* Part III.A (exploring various interests implicated when student test accommodations granted).

22. See *infra* Part IV (summarizing conclusions and hypothesizing solutions).

23. See 42 U.S.C. § 12101(b)(2) (2005). The ADA seeks to provide a clear and comprehensive mandate for the elimination of such discrimination against the disabled. 42 U.S.C. § 12101(b)(1) (2000) (noting objective of ADA).

24. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 933, 104 Stat. 327, 328-9 (codified as amended at 42 U.S.C. § 12101(a) (2005)) (listing congressional findings concerning disabled as minority group); see also *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 494 (1999) (Ginsburg, J., concurring) (reiterating political powerlessness of disabled); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (declaring minority groups' political powerlessness demands protection from inherently discriminatory majoritarian process). Political powerlessness is the result of common social perceptions held toward the disabled. See 42 U.S.C. § 12101(a)(6) (2005) (providing census data, national polls, and studies showing

continued existence of unfair and unnecessary discrimination, which denies the disabled an opportunity to compete on an equal basis, ultimately costs the United States billions of dollars as a result of consequent dependency and nonproductivity.<sup>25</sup> As a result, Congress enacted the ADA to protect the interests it found consistent with the spirit of the United States Constitution.<sup>26</sup>

Title III of the ADA mandates that law schools provide reasonable accommodations to those students having disabilities under the Act.<sup>27</sup> Additionally, if the student determines that the petitioner is substantially limited in the major life activity of “working,” the court might apply definitions from Title I which control employer discrimination.<sup>28</sup> Such an application of Title I triggers a critical divergence in the ADA analysis, applying a different standard when assessing whether the student is, in fact, disabled and should therefore be granted an exam accommodation remedy under the ADA.<sup>29</sup> The justification for this divergence in the application of Title I to law schools is perhaps rooted in the school’s unique status as a provider of *professional* education.<sup>30</sup>

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disabled occupy inferior status in America); Andrew Weis, *Jumping to Conclusions in “Jumping the Queue,”* 51 STAN. L. REV. 183, 203 (1998) (Reviewing MARK KELMAN AND GILIAN LESTER, *JUMPING THE QUEUE: AN INQUIRY INTO THE LEGAL TREATMENT OF STUDENTS WITH LEARNING DISABILITIES* (1997)) (observing learning-disabled students frequently subject to unfair stereotypes).

25. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 933, 104 Stat. 327, 320 (codified as amended at 42 U.S.C. § 12101(a)(9) (2005)) (noting economic effect on United States economy resulting from powerless disabled class). Congress found that approximately forty-three million Americans have a mental or physical disability and “this number is increasing as the population [grows] . . . older.” 42 U.S.C. § 12101(a)(1) (2005).

26. See 42 U.S.C. § 12101(a)(8) (2005) (stating Nation’s proper goals with respect to disabled individuals). In particular, Congress noted that “the Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . .” *Id.* Congress enacted the ADA pursuant to its power to enforce the Fourteenth Amendment and regulate commerce. See 42 U.S.C. § 12101(b)(4) (2005) (invoking its sweep of congressional authority); see also U.S. CONST. amend. XIV, § 1, cl. 2 (providing “no State shall deprive any person of life, liberty, or property without due process”); U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to regulate commerce among the several states).

27. 42 U.S.C. § 12181(7)(J) (2005) (extending scope of Title III to cover postgraduate education). Title III thus extends the scope of disability protection beyond the workers and employees covered under Title I. Compare 42 U.S.C. § 12112(a) (2005) (prohibiting employers from discriminating against employees because of disability), with 42 U.S.C. § 12181(7)(J) (2005) (extending prohibition to postgraduate schools).

28. See *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 226 F.3d 69, 82-84 (2d Cir. 2000) (affirming application of Title I standard where law student alleged limitation in “working”), *remanded to* 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001). *But see* *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 631 (6th Cir. 2000) (declining to “transplant” Title I definitions into Title III definitions); Hunsicker, *supra* note 3, at 3-4 (criticizing *Bartlett* decision). Title I protects against discrimination towards employees. 42 U.S.C. § 12112(a) (2005) (prohibiting employers from discriminating against employees because of disability).

29. Compare *Bartlett*, 2001 WL 930792, at \*44 (using “persons of comparable training, skills, and abilities” as normative standard), with *Gonzales*, 225 F.3d at 631 (using “general population” as normative standard). This distinction and circuit split may prove critical to the outcome for the petitioner. See *infra* Part III.A (analyzing which normative standard should apply).

30. *Bartlett v. N.Y. State Bd. of Law Exam’rs*, 970 F. Supp. 1094, 1121 (S.D.N.Y. 1997) (recognizing major life activity of “working” by viewing law school examination as employment test), *aff’d* 2 F. Supp. 2d

Under the ADA, a disability is defined as a physical or mental impairment that substantially limits one or more of the major life activities.<sup>31</sup> The United States Supreme Court has set forth a three-step process to determine whether a student petitioner claiming a violation under the Act has been unduly prevented from engaging in such life activities.<sup>32</sup> First, the Court will determine whether the petitioner's alleged disability is a physical or mental impairment.<sup>33</sup> Second, the Court probes further into whether the life activity upon which petitioner relies is a "major life activity" under the ADA.<sup>34</sup> Under the third step, the Court will determine whether petitioner is "substantially limited" in this major life activity.<sup>35</sup> During the judicial review of accommodation requests, controversy most often arises under the final two prongs of the judicial inquiry which probe whether the petitioner is "substantially limited" in a "major life activity."<sup>36</sup> Accordingly, circuits have split with respect to the interpretation and application of such language.<sup>37</sup>

In order to implement the mandate, Congress conferred authority on the Equal Employment Opportunity Commission (EEOC) and the Department of

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388 (S.D.N.Y. 1997) (denying motion for reconsideration on different grounds), *aff'd* 156 F.3d 321 (2d Cir. 1998), *vacated by* 527 U.S. 1031 (1999). *But see* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999) (expressing doubt whether "working" qualifies as major life activity). In *Sutton*, the Court opined the circular reasoning inherent in arguing that "working" is a major life activity. *Id.* "[T]o say that if one is excluded, for instance, by reason of [an impairment from working with others] . . . then that exclusion constitutes an impairment, when the question you're asking is, whether the exclusion itself is by reason of the handicap." *Id.*

31. *See* 42 U.S.C. § 12102(2)(A) (2000) (defining disability). *See generally* Michael Faillace, *Title I of The Americans with Disabilities Act: Statutory Requirements, Legislative History, Regulations, Technical Assistance Manual, Relevant Caselaw and Practical Recommendations Under the ADA & 1973 Rehabilitation Act*, 713 P.L./LIT 409 (discussing statutory requirements and relevant caselaw); John F. Wagner, Annotation, *What Constitutes Substantial Limitation On Major Life Activity of Working For Purposes of Americans with Disabilities Act*, 141 A.L.R. FED. 603, 1 (1997) (discussing what constitutes substantial limitation on major life activity).

32. *See* *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (setting forth three-step test to determine disability of petitioner under Act); *see also* *Bartlett*, 2001 WL 930792, at \*29 (applying three-step test).

33. *See* *Bragdon*, 524 U.S. at 632 (providing first step). The *Bragdon* Court relied on regulations issued by the Department of Health, Education and Welfare (HEW) interpreting the Rehabilitation Act of 1977. *Id.* The Rehabilitation Act of 1977 applies to schools that receive federal financial assistance. *See* Deborah Leuchovius, *ADA Q & A: Section 504 & Postsecondary Education*, PACER, Dec. 29, 2005, <http://www.pacer.org/pride/504.html> (describing Section 504 of Rehabilitation Act). Title II of the ADA was modeled after Section 504 of the Rehabilitation Act. Therefore, the courts may use the Rehabilitation Act to aid in ADA interpretation.

34. *See* *Bragdon*, 524 U.S. at 637 (detailing second step).

35. *Id.* at 639 (detailing last step).

36. *See id.* at 631 (setting forth appropriate test to determine whether disability qualifies under Act). Determining whether an alleged disability should be accommodated has proved controversial in post-secondary and professional education. *See, e.g.*, *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 630 (6th Cir. 2000) (declining to extend ADA protection to medical student's reading disability); Hunsicker, *supra* note 3, at 4-5 (arguing against grant of testing accommodation on bar exam for law student with learning disability); Stone, *supra* note 3, at 567 (noting challenge law schools confront in applying ADA in equal manner).

37. *Compare* *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93-CV-4986, 2001 WL 930792, at \*44 (S.D.N.Y. Aug. 15, 2004) (acknowledging "working" as impaired major life activity), *with* *Gonzales*, 225 F.3d at 631 (declining to accept "working" as impaired major life activity); *see also supra* note 29.

Justice (DOJ) to issue regulations aiding courts with interpretations of definition in Titles I and III, respectively.<sup>38</sup> Both the EEOC and DOJ include “working” as a major life activity in their issued regulations.<sup>39</sup> Interestingly, however, the EEOC’s Title I regulation provides a different and qualified standard of comparison when determining whether a petitioner is substantially limited.<sup>40</sup> For instance, under Title I, if the petitioner claims that he is substantially limited in the major life activity of “working,” his performance will be compared to the “average person having similar training, skills, [and] abilities.”<sup>41</sup>

Application of this Title I definition to institutions within the scope of Title III jurisdiction has proved controversial when dealing with professional educational exams for two key reasons.<sup>42</sup> First, the party opposing testing accommodations, usually a professional licensing board, will argue that regulations defining Title I of the ADA should not be applied to Title III.<sup>43</sup> Second, the qualified standard will render petitioner’s chances of success more likely, implicating various constituencies whose interests will also be affected if testing accommodations are granted.<sup>44</sup>

### B. Which Normative Standard Should Apply?

In defining the statutory language of the ADA, courts show limited deference to the regulations promulgated by the EEOC and DOJ.<sup>45</sup> Reading, writing, and working have all been held to constitute major life activities under

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38. See 42 U.S.C. §§ 12134, 12186 (2005); see also *Price v. Nat’l Bd. of Med. Exam’rs*, 966 F. Supp. 419, 425 (S.D. W. Va. 1997) (holding courts must give DOJ regulations controlling weight unless contrary to ADA). Congress did not confer authority on the EEOC, or for that matter the DOJ, to issue regulations regarding the interpretation of the term “disability.” *Gonzales*, 225 F.3d at 631 (noting lack of authority to define disability).

39. See 29 C.F.R. § 1630.2(j)(3)(i) (1999) (including “working” as major life activity for purposes of Title I); 28 C.F.R. pt. 36, App. B (2005) (including “working” as major life activity for purposes of Title III).

40. See 29 C.F.R. § 1630.2(j)(3)(i) (1999) (setting forth qualified standard when substantially limited in “working”).

41. *Id.* For example, if a law student claimed the disability, he or she would be compared with other law students. *Id.* This differs from the Title III standard which would compare the petitioner to the average population. 28 C.F.R. pt. 36, App. B (2005).

42. See *infra* notes 43-44 and accompanying text (providing reasons why Title I standard is controversial).

43. See *Gonzales*, 225 F.3d at 631 (explaining why Title I definitions do not apply to Title III).

44. See *Hunsicker*, *supra* note 3, at 14-18 (discussing other interests affected when schools grant test accommodations). For example, the accommodated student’s peers may not agree with the extent of the accommodations. *Id.*

45. See *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 631 (6th Cir. 2000) (rejecting application of EEOC standard to ADA interpretation); *Price v. Nat’l Bd. of Med. Exam’rs*, 966 F. Supp. 419, 425 (S.D. W. Va. 1997) (holding courts must give DOJ regulations controlling weight unless “manifestly contrary” to ADA). Although courts must follow an interpretive guideline unless manifestly contrary, a court may refuse to apply the guideline because it views each title of the ADA separately. *Gonzales*, 225 F.3d at 631 (declining to apply definitions outside Title III).

the Act.<sup>46</sup> When a petitioner sues for relief seeking testing accommodations for a professional licensing exam, the court will likely find that because the exam serves as a gateway to the profession, it implicates the major life activity of “working.”<sup>47</sup> Although the EEOC Title I regulations would provide an employer’s standard in determining whether the petitioner has been substantially limited in working, the Sixth Circuit Court of Appeals has expressly rejected the application of this standard to a Title III claim.<sup>48</sup> Where the court decides that the Title I standard should apply, the petitioner’s chance of success is increased.<sup>49</sup>

*i. Gonzales v. National Board of Medical Examiners*

In *Gonzales v. National Board of Medical Examiners*,<sup>50</sup> a medical student petitioner seeking testing accommodations for a professional licensing exam filed for injunctive relief when the medical board denied his request for accommodations.<sup>51</sup> The petitioner provided a medical diagnosis of his alleged learning disability, claiming that without testing accommodations he was substantially limited in the major life activities of reading, writing, and working.<sup>52</sup> The Sixth Circuit Court of Appeals denied the petitioner’s request,

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46. See *Gonzales*, 225 F.3d at 627 (acknowledging reading, writing, and working as major life activities under ADA). In *Sutton*, however, the Court noted the conceptual difficulty in arguing “working” as a major life activity. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 492 (1999). The Court opined, “it seems ‘to argue in circle to say that if one is excluded, for instance, by reason of [an impairment, from working with others] . . . then that exclusion constitutes an impairment, when the question you’re asking is, whether the exclusion itself is by reason of handicap.’” *Id.* at 492 (quoting Transcript of Oral Argument at 15, *Bd. of Nassau Co. v. Arline*, 480 U.S. 273 (1987) (No.85-1277)).

47. See *Bartlett v. N.Y. State Bd. of Med. Exam’rs*, 970 F. Supp. 1094, 1121 (S.D.N.Y. 1997) (finding bar examination clearly implicates major life activity of working), *aff’d*, 2 F. Supp. 2d 388 (S.D.N.Y. 1997) (denying motion for reconsideration on different grounds), *aff’d*, 156 F.3d 321 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999). This does not necessarily mean, however, that petitioner is substantially limited in “working.” See *Gonzales*, 225 F.3d at 632.

48. See *Gonzales*, 225 F.3d at 631 (declining to apply Title I standard to Title III claim). Furthermore, in *Gonzales*, the Court notes that although the petitioner is claiming a disability in the major life activity of working, his impairments will not restrict his ability to do work at the professional level. *Id.* at 631 n.17.

49. Compare *Gonzales*, 225 F.3d at 631-32 (declining to apply Title I standard and rejecting petitioner’s claim), with *Bartlett v. N.Y. State Bd. of Law Exam’rs*, No. 93-CV-4986, 2001 WL 930792, at \*44 (S.D.N.Y. Aug. 15, 2004) (applying Title I standard to Title III claim and granting petitioner’s request for accommodations).

50. 225 F.3d 620 (6th Cir. 2000).

51. See *id.* at 624 (denying petitioner’s claim). *Gonzales* filed his action in federal court under the ADA prior to taking the professional certification test for his third time. *Id.* His two prior requests for accommodations had likewise been denied. *Id.* at 623-24. *Gonzales* failed both tests without the accommodations. *Id.*

52. *Id.* at 625 (noting petitioner provided medical opinion stating he suffered from learning disability); see also 42 U.S.C. § 12102(2)(A) (2005) (providing petitioner may claim under ADA if substantially limited in major life activity). The DOJ’s regulations further defining major life activities include “walking, learning, and working.” 28 C.F.R. § 36.104(2) (2006). The ADA itself does not define these terms, nor do the DOJ definitions comprise an exhaustive list. *Gonzales*, 225 F.3d at 626. Courts have accepted that reading and writing are major life activities under the ADA. See *Gonzales*, 225 F.3d at 627-30 (recognizing reading and

holding that he was not substantially limited in those major life activities when compared to most people in the general population.<sup>53</sup>

The prevailing defendant willingly conceded that reading, writing, and working, were major life activities covered under Title III of the ADA.<sup>54</sup> The medical board, however, refused to provide requested testing accommodations because petitioner *was not* “substantially limited” in these major life activities when compared to the average population.<sup>55</sup> The medical board successfully persuaded the Court that exclusively Title III should apply, and that the petitioner should be compared to the average person in the general population.<sup>56</sup> The Court ultimately agreed and rejected the petitioner’s argument that Title I EEOC regulations should apply.<sup>57</sup> The Title I regulations require that the student petitioner is compared with “the average person having comparable training, skills, and abilities.”<sup>58</sup> As such, the Board denied petitioner’s request because he was not substantially limited in the major life activities of reading, writing, or working when compared to “most people,”

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writing as major life activities); *Bartlett v. N.Y. State Bd. of Law*, No. 93-CV-4986, 2001 WL 930792, at \*33 (S.D.N.Y. Aug. 15, 2001) (indicating courts’ acceptance of reading and writing as disabilities under the act). *But see Hileman v. City of Dallas*, 115 F.3d 352, 355 n.4 (5th Cir. 1997) (expressing doubt “reading” constitutes major life activity under ADA).

53. *Gonzales*, 225 F.3d at 630-32 (holding petitioner not substantially limited in reading, writing, or working when compared to most people). The court notes the United States Supreme Court clarification that “‘substantially’ suggests ‘considerable, specified to a large degree,’ and ‘in a substantial manner.’” as opposed to mere trivial limitations that accompany a disability. *Id.* at 627 n.12 (quoting *Sutton v. United Air Lines*, 527 U.S. 471, 480 (1999)); *see also infra* notes 58-59 and accompanying text (explaining Court’s holding).

54. *Gonzales*, 225 F.3d at 626 (noting NBME does not dispute reading and writing constitute major life activities).

55. *Gonzales*, 225 F.3d at 624, 626 (stating case turns on “substantially limits”). The medical board reviewed *Gonzales*’ submission of medical opinion diagnosis and concluded he was not disabled under the ADA. *Id.* at 624. This rejection of testing accommodations caused *Gonzales* to file action in federal court under the ADA. *Id.*

56. *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d at 620, 627 (6th Cir. 2000) (providing ADA compares individual alleging restriction in major life activity to “most people”); *see also* 28 C.F.R., pt. 36, App. B (2005) (defining “substantially limits” in terms of general population). *But see Bartlett v. New York State Bd. of Law Exam’rs*, No. 93 Civ. 4986, 2001 WL 930792, at \*44 (S.D.N.Y. Aug. 15, 2001) (analyzing Title III claim under comparison to persons of similar training and skills); 29 C.F.R. § 1630.2(j)(3)(i) (2004) (defining EEOC comparative standard to average person with similar skills and training under Title I).

57. *Gonzales*, 225 F.3d at 631 (declining to “transplant . . . Title I regulations into the Title III regulations”).

58. *Id.* at 630-31 (refusing to adopt Title I definitions). Although the EEOC and DOJ issue regulations defining Titles I and III, respectively, the EEOC provides for an additional comparative standard to use when the petitioner alleges he is substantially limited in the major life activity of working. *See* 29 C.F.R. § 1630.2(j)(3)(i); *supra* note 38. *Gonzales* argued that under this test he should be compared to other second-year medical students, as opposed to the average person in the general population. *Gonzales*, 225 F.3d at 630-31 (arguing for EEOC application). The Court held that the DOJ’s silence, in refusing to follow the EEOC by including a more particular normative standard for the major life activity of working, is dispositive evidence that it did not intend such a standard to apply to Title III. *Gonzales*, 225 F.3d at 631. The use of the EEOC normative standard might have resulted in granting petitioner’s request for accommodations. *See Bartlett*, 2001 WL 930792, at \*37 (concluding petitioner disabled when compared to other similarly situated graduate students).

thus depriving him of the accommodation.<sup>59</sup>

ii. *Bartlett v. New York State Board of Law Examiners*

In *Bartlett v. New York State Board of Law Examiners*,<sup>60</sup> a law student petitioner similarly filed for injunctive relief requesting testing accommodations under Title III of the ADA.<sup>61</sup> Here, unlike *Gonzales*, the court took into consideration the EEOC regulations defining Title I of the ADA.<sup>62</sup> The petitioner's argument, analogous to the argument raised by the petitioner in *Gonzales* but viewed through a Title I lens, required the court to consider whether the petitioner was disabled when compared to "the average person having comparable training, skills, [and] abilities."<sup>63</sup> While using this standard, however, the court maintained that the claim was still a Title III and not a Title I claim.<sup>64</sup> As a result, the court concluded that petitioner was substantially limited in the major life activity of working when compared to other law students, and therefore must be accommodated under the ADA.<sup>65</sup> Consequently, the Second and Sixth Circuits split with respect to their willingness to apply EEOC Title I definitions to Title III claims.<sup>66</sup>

C. *Frequently Asserted Disabilities*

Law students requesting accommodations under the ADA claim a variety of learning disabilities, including dyslexia, attention deficit disorder (ADD/ADHD), or disorder of written expression (DWE).<sup>67</sup> Petitioners claiming under the ADA argue that it is these disabilities that limit them in a

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59. *Gonzales*, 225 F.3d at 632 (holding *Gonzales* not substantially limited in major life activities).

60. No. 93 Civ. 4986, 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

61. See *Bartlett*, 2001 WL 930792, at \*1 (stating petitioner's claim). Like *Gonzales*, *Bartlett* also filed a medical opinion diagnosis along with her request for testing accommodations. *Id.* at \*4-5.

62. See *id.* at \*41 (applying EEOC standard). Cf. *Gonzales*, 225 F.3d at 631 (declining to apply EEOC Title I regulation to Title III claim).

63. *Bartlett*, 2001 WL 930792, at \*41 (comparing petitioner to persons of comparable training, skills, and abilities). The court acknowledged its application of EEOC guidelines to the Title III claim. *Id.* at \*44 n.55.

64. *Id.* at \*1 (excluding mention of any Title I claim).

65. *Id.* at \*3 (holding petitioner substantially limited in major life activity of working).

66. Compare *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 631 (6th Cir. 2000) (declining to "transplant Title I regulations into Title III regulations"), with *Bartlett v. N.Y. State Bd. of Med. Exam'rs*, 970 F. Supp. 1094, 1099 (S.D.N.Y. 1997) (applying EEOC standard to Title III), *aff'd*, 2 F. Supp. 2d 388 (S.D.N.Y. 1997) (denying motion for reconsideration on issue of application), *aff'd*, 156 F.3d 321 (2d Cir. 1998), *vacated*, 527 U.S. 1031 (1999). The lower court in *Bartlett* explained that use of the qualified Title I standard is applicable to Title III because it is consistent with the spirit and letter of the ADA "rule of interpretation," which supports using regulations of a different title to assist interpretation of another title so long as the concept is not addressed on its own. *Id.*

67. See Weiss, *supra* note 1, at 244-48 (detailing dyslexia, ADD/ADHD, and DWE); see also *Gonzales*, 225 F.3d at 624 (acknowledging petitioner diagnosed with DWE); *Price v. Nat'l Bd. of Med. Exam'rs*, 966 F. Supp. 419, 422 (S.D. W. Va. 1997) (acknowledging petitioner diagnosed with ADD/ADHD); *Bartlett v. N.Y. State Bd. of Med. Exam'rs*, No. 93 Civ. 4986, 2001 WL 930792, at \*5 (S.D.N.Y. Aug. 15, 2001) (acknowledging petitioner diagnosed with dyslexia).

major life activity and therefore warrant protection under the ADA.<sup>68</sup> As a prerequisite to ADA accommodations, however, each disability must be substantiated with evidence corroborating the impairment.<sup>69</sup>

*i. Dyslexia*

Dyslexia is a learning disorder marked by impairment of the ability to recognize and comprehend written words.<sup>70</sup> Dyslexia is “not a measure of innate intelligence, but occurs in individuals with average to superior intelligence.”<sup>71</sup> Critics argue that doctors often improperly diagnose dyslexia.<sup>72</sup> As a result, dyslexia, the most often disability claimed under the ADA, has been met with skepticism from examiners.<sup>73</sup> For instance, in *Rosenthal v. New York State Board of Law Examiners*,<sup>74</sup> a Stanford Law graduate with a well-documented case of dyslexia requested, but was denied, extended time on the bar exam.<sup>75</sup> The lawsuit attracted the attention of the DOJ, ultimately resulting in the New York State Board of Law Examiners granting Rosenthal the requested accommodation.<sup>76</sup>

*ii. Attention Deficit Disorder*

ADD/ADHD is an impairment of the ability to focus or maintain attention.<sup>77</sup>

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68. See, e.g., *Gonzales*, 225 F.3d at 625 (recognizing petitioner’s claim that DWE limited him); *Price*, 966 F. Supp. at 422 (recognizing petitioner’s claim ADD/ADHD limits him); *Bartlett*, 2001 WL 930792, at \*7 (recognizing petitioner’s claim that dyslexia substantially limits her).

69. See Weiss, *supra* note 1, at 244 (noting adequate documentation required to evaluate whether to grant accommodation).

70. See The International Dyslexia Association, *Frequently Asked Questions*, [http://www.interdys.org/servlet/compose?section\\_id=5&page\\_id=95](http://www.interdys.org/servlet/compose?section_id=5&page_id=95) (last visited Dec. 28, 2005) (defining dyslexia).

71. See Weiss, *supra* note 1, at 244 (characterizing dyslexia).

72. See Weiss, *supra* note 1, at 244 (noting dyslexia often misdiagnosed); see also Dolores Hiskes, *Dyslexia Revisited*, DORBOOKS (2004), available at <http://www.dorbooks.com/dyslexia.html> (recognizing wide-spread disagreement concerning dyslexia diagnosis).

73. Weiss, *supra* note 1, at 244 (observing dyslexia most common disability cited by students claiming under ADA); see also *Bartlett v. N.Y. State Bd. of Law Exam’rs*, No. 93 CV 4986, 2001 WL 930792, at \*7 (S.D.N.Y. Aug. 15, 2001) (summarizing petitioner’s claim dyslexia substantially limits her in learning). There is some disagreement as to what extent this learning disability should be accommodated. Compare *Bartlett*, 2001 WL 930792, at \*51 (granting accommodation for dyslexia), with *Gonzales v. Nat’l Bd. of Med. Exam’rs*, 225 F.3d 620, 630 (6th Cir. 2000) (denying petitioner’s claim that dyslexia limits him in reading). See generally Noel Gregg & Nancy Mather, *Discrimination Against High Achieving Adults With Learning Disabilities: A Tragic Consequence of Public Law Interpretation*, Tennessee Center for the Study and Treatment of Dyslexia (2001), available at <http://dyslexia.mtsu.edu/modules/articles/displayarticle.jsp?id=55> (observing disagreement regarding whether courts should accommodate dyslexia).

74. Memo. of Law by Amicus Curiae by United States Gov’t, *Rosenthal v. N.Y. State Bd. of Law Exam’rs*, No. 92 Civ. 1100 (S.D.N.Y. 1992).

75. See generally *id.* (denying accommodation).

76. *Id.* (reversing original denial of claim and allowing accommodation). The DOJ provides regulations defining Title III of the ADA. See *supra* note 40 and accompanying text (highlighting DOJ’s role in ADA interpretation).

77. See Optometrists Network, Attention Deficit Disorder, [http://www.add-adhd.org/ADHD\\_attention-](http://www.add-adhd.org/ADHD_attention-)

ADD/ADHD, like dyslexia, is also subject to the criticism of improper- and over-diagnosis.<sup>78</sup> Although fifty to sixty percent of those diagnosed with ADD/ADHD will show symptoms until age sixteen, only ten percent show any symptoms by the time they turn thirty.<sup>79</sup>

*iii. Disorder of Written Expression*

DWE is a learning disability in which the person's writing ability is well below average when compared to others of the same age.<sup>80</sup> As a result of the disorder being poorly understood, courts have been less receptive to petitioners' claims that they suffer from DWE.<sup>81</sup> Courts view average scores on prior standardized tests as strong evidence that the petitioner is not substantially limited by DWE.<sup>82</sup> Because so little is known about DWE, courts should examine requests for accommodations with flexibility so as to promulgate Congress's legislative intent in enacting the ADA.<sup>83</sup>

*D. The Various Accommodations Requested*

Assuming the petitioner qualifies as disabled under the ADA, what type of accommodation can preserve the fundamental fairness associated with law school testing?<sup>84</sup> Three of the most prevalent and controversial testing accommodations include changing the exam format, extended time, and waiving course requirements.<sup>85</sup> Determining the appropriate testing

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deficit.html (last visited Dec. 29, 2005) (characterizing ADD/ADHD).

78. See Doreka!, Overdiagnosis of Attention Deficit Disorder, <http://www.doreka.com/add/000018.htm> (last visited Dec. 29, 2005) (explaining ADD/ADHD overdiagnosed).

79. See Weiss, *supra* note 1, at 223-24 (suggesting people grow out of ADD as they age).

80. See ENCYCLOPEDIA OF MENTAL DISORDERS, DISORDER OF WRITTEN EXPRESSION, <http://www.minddisorders.com/Del-Fi/Disorder-of-written-expression.html> (last visited Dec. 29, 2005) (characterizing symptoms of DWE). A student with DWE may write incomplete sentences and make frequent errors in syntax, grammar, and punctuation. Hunsicker, *supra* note 3, at 15 (listing tendencies of students with DWE).

81. See ENCYCLOPEDIA OF MENTAL DISORDERS, DISORDER OF WRITTEN EXPRESSION, <http://www.minddisorders.com/Del-Fi/Disorder-of-written-expression.html> (last visited Dec. 29, 2005) (noting DWE is less understood learning disorder); see also *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 630 (6th Cir. 2000) (declaring petitioner failed to show he was substantially limited in writing); *Price v. Nat'l Bd. of Med. Exam'r*, 966 F. Supp. 419, 428 (S.D. W. Va. 1997) (concluding petitioner's DWE failed to qualify for ADA protection).

82. See *Price*, 966 F. Supp. at 427-28 (concluding past performance on scholastic achievement exams shows petitioner not substantially limited). *But see Pazer v. N.Y. State Bd. of Law Exam'rs*, 849 F. Supp. 284, 287 (S.D.N.Y. 1994) (recognizing disparity between exam performance and student's potential may suggest disability even if exam performance is average).

83. See Weiss, *supra* note 1, at 247 (arguing for flexibility in examining for DWE).

84. See, e.g., Hunsicker, *supra* note 3, at 14-15 (criticizing extended time exams); Stone, *supra* note 3, at 567 (observing law schools must provide accommodations in equitable manner); Weiss, *supra* note 1, at 226 (recognizing law school predicated on equality among students).

85. See Donald H. Stone, *What Law Schools Are Doing to Accommodate Students With Learning Disabilities*, 42 S. TEX. L. REV. 19, 43-45 (2000) (analyzing various requested testing accommodations).

accommodation is important because of the other various interests involved.<sup>86</sup> The accommodation must level the playing field for the disabled student and not undermine the academic standards of the law school itself.<sup>87</sup>

*i. Changing The Exam Format*

One type of accommodation available under the ADA is a modification of the traditional exam format.<sup>88</sup> Essay tests are the gold standard of law school examinations because they require the same skills necessary for the successful practice of law.<sup>89</sup> If, for instance, the essay were changed to a multiple choice exam, the learning-disabled student would benefit because he could focus on smaller amounts of information.<sup>90</sup> On the other hand, if the professor must create a multiple choice exam for a particular student, anonymity in the testing procedure could be compromised.<sup>91</sup> Furthermore, the essay test distinguishes those students who can decipher and understand the material from those who get lucky guessing on multiple choice exams.<sup>92</sup> Therefore, altering the exam format may not be an appropriate accommodation because it essentially tests different abilities than those initially claimed were inhibited by the ADA petitioner.<sup>93</sup>

*ii. Extended Time*

Most students with disabilities claiming under the ADA request extended time, the most controversial of all accommodations.<sup>94</sup> Proponents of extended time argue that it does not substantially alter the method in which examinations are scored.<sup>95</sup> Additionally, extended time is the least burdensome approach for

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86. See *infra* Part III.C (exploring effects of ADA student accommodations on other parts of the law school institution).

87. See *supra* note 24 (citing ADA's objective to assist disabled class); Hunsicker, *supra* note 3, at 14 (questioning appropriateness of law student accommodations under Title I).

88. See Weiss, *supra* note 1, at 234 (discussing exam modification and problems related thereto).

89. See Weiss, *supra* note 1, at 234 (observing essay exams require students to issue-spot, state law, and then apply it). An inability to write well has been labeled the "ultimate kiss of death" for a young associate trying to make partner. See Hunsicker, *supra* note 3, at 16 (noting consequences when young associates lack requisite legal skills).

90. See Weiss, *supra* note 1, at 234 (discussing benefits of multiple-choice exams to disabled student).

91. See Weiss, *supra* note 1, at 234-35 (noting anonymity in examination procedure might be compromised for sake of accommodation).

92. See Weiss, *supra* note 1, at 234-35 (noting multiple choice exams may test different skills and favor particular students).

93. See Weiss, *supra* note 1, at 234-35 (discussing exam modification). If a professor administered a multiple-choice exam to a student with a limited writing ability pursuant to an ADA claim, then the accommodation would circumvent the law school's requirements instead of "leveling the playing field." See Hunsicker, *supra* note 3, at 18.

94. See Weiss, *supra* note 1, at 235 (observing extended time most requested and most controversial accommodation); see also Hunsicker, *supra* note 3, at 14-15 (arguing against extended time for law school examinations).

95. Weiss, *supra* note 1, at 235 (acknowledging extended time may not threaten benchmark for judging

the law school because it minimizes complaints from other law students.<sup>96</sup> Law schools will usually grant time-and-a-half accommodations to students claiming learning disabilities.<sup>97</sup>

Critics of extended time accommodations argue that speed is one of the critical factors contributing to a successful legal practice, and therefore extended time is unfair to any student.<sup>98</sup> “Quickly responding to a judge’s orders or providing a rapid answer to a client’s complex question” are important faculties required in practice.<sup>99</sup> Critics also argue that if one assumes a substantial increase in the disabled student’s scores, the non-disabled student’s score will also increase the same, if not more.<sup>100</sup> This argument, however, presumes that a substantial improvement will be automatic for the disabled student.<sup>101</sup> Granting extended time will remain controversial throughout law school exam procedures because other students view the accommodation as negating the most critical and daunting aspect of the law school examination: time.<sup>102</sup>

### iii. Waiver of Course Requirements

Nearly all law schools require some form of writing requirement to be completed before a student graduates.<sup>103</sup> Such a requirement is necessary given the need for strong writing ability during professional practice.<sup>104</sup> Because ADD/ADHD and dyslexia do not affect one’s ability to write, these learning disabilities should never be granted the accommodation of waiving the writing requirement.<sup>105</sup> If the disabled student claiming under the ADA cites DWE, however, then a more careful analysis should be exercised before denying the petitioner’s request because the facts surrounding the disorder are not well-

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students). *But see infra* note 98 and accompanying text (providing counter-argument).

96. *See* Weiss, *supra* note 1, at 235 (suggesting possible motivation for law school’s frequent grant of extended time on exams). Complaints from other law students are minimized because the accommodation is quick and easy to provide so that other students are not aware of it. *Id.*

97. *See* J.J. Knauff, *Dissing Disabilities: A Student’s Duty to Mitigate Maladies*, 2001 BYU EDUC. & L.J. 85, 101 (2001) (indicating extended time most granted accommodation).

98. Hunsicker, *supra* note 3, at 14 (commenting speed beneficial to practice).

99. Weiss, *supra* note 1, at 236 (arguing against giving time advantage to disabled students).

100. *See* Hunsicker, *supra* note 3, at 14 (criticizing extended time for law school exams). *But see infra* note 101 and accompanying text (justifying extended time accommodations).

101. *See* Weiss, *supra* note 1, at 236 (arguing “leg-up” theory rests on invalid presumption). Weiss argues that this criticism presumes a substantial improvement will be automatic for the learning disabled student, but in reality this is not the case. *Id.*

102. *Compare* Hunsicker, *supra* note 3, at 14 (arguing extended time not fair to other students), *with* Weiss, *supra* note 1, at 237 (arguing extended time not unfair to non-disabled students).

103. *See* Stone, *supra* note 3, at 591 (noting many law schools have writing requirement).

104. *See* Hunsicker, *supra* note 3, at 16 (observing how frequently lawyers must utilize writing skills).

105. *See* Weiss, *supra* note 1, at 240-41 (arguing against waiver of course requirements for students with ADD/ADHD or dyslexia). These disorders should not be accommodated by lifting the writing requirement because they do not affect one’s ability to write. *Id.*

known.<sup>106</sup>

In *Florida Board of Bar Examiners re S.G.*,<sup>107</sup> the petitioner requested that her scores from each portion of the bar exam be averaged together.<sup>108</sup> Having failed the bar exam with extended time on all portions, the petitioner claimed that her ADD/ADHD entitled her to have both sections averaged so that she would receive a passing grade, thereby modifying the necessary minimum score needed to pass.<sup>109</sup> The court held that the Board did not have to modify the method of scoring in light of the ADA because it would fundamentally alter the required minimum standard the test was intended to ensure.<sup>110</sup> Thus, while bar examiners will accommodate those students with ADD/ADHD, it is unlikely that they will go so far as to modify the scoring method itself.<sup>111</sup>

### III. ANALYSIS

#### A. *What Standard Should Determine Whether Test Accommodations Are Granted?*

When law school students petition for testing accommodations under the ADA, they should be compared to all other law students rather than the general population. In terms of judicial analysis, the courts should apply the qualified Title I standard even though Title III provides the explicit jurisdiction over the law school.<sup>112</sup> The application of the Title I standard, like in *Bartlett*, is more appropriate because of the professional nature of post-secondary graduate schools such as law schools.<sup>113</sup> These institutions serve as a gateway through which students first enter the legal profession.<sup>114</sup> Moreover, admitting more

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106. See Weiss, *supra* note 1, at 241 (suggesting waiver of course requirements could be appropriate for some DWE students). However, Weiss ultimately concludes that waiver of the writing requirement is never warranted. Weiss, *supra* note 1, at 241.

107. 707 So. 2d 323 (Fla. 1998).

108. *Id.* at 325 (denying petitioner's request to average scores on bar examination taken at different times).

109. See *id.* at 323 (explaining petitioner took exam on numerous occasions and failed with time accommodations).

110. *Id.* at 325 (holding Bar not required to fundamentally modify standards for ADA); see also Maczaczynj v. New York, 956 F. Supp. 403, 409 (W.D.N.Y. 1997) (holding educational institution not required to lower or modify minimum standards to accommodate disabled person).

111. See *Fla. Bd. of Bar Exam'rs*, 707 So. 2d at 325; see also Weiss, *supra* note 1, at 247 (concluding courts unlikely to modify scores of students requesting accommodations).

112. Cf. 42 U.S.C. § 12181(7)(J) (2000) (defining Title III jurisdiction to include postgraduate schools); *Bartlett v. N.Y. State Bd. Of Law Exam'rs*, 226 F.3d 69, 82-84 (2d Cir. 2000) (affirming application of Title I standard to Title III jurisdiction), *remanded to*, No. 93 Civ. 4986(SS), 2001 WL 930792 (2d Cir. 2001).

113. See *Bartlett v. N.Y. State Bd. of Med. Exam'rs*, 970 F. Supp. 1094, 1121 (S.D.N.Y. 1997) (recognizing major life activity of "working" by viewing law school examination as employment test), *aff'd*, 2 F.Supp.2d 388 (S.D.N.Y. 1997) (denying motion for reconsideration on different grounds), *aff'd*, 156 F.3d 321 (2d Cir. 1998), *vacated by* 527 U.S. 1031 (1999); see also *supra* note 4 (explaining similarity between law school performance and one's early professional career).

114. See *supra* note 4 and accompanying text (explaining link between one's law school performance and early legal job prospects).

disabled law students to the bar will have a positive effect on the legal community and its clients.<sup>115</sup> Thus, applying a Title I standard where the student claims he is substantially limited in working is by no means a misapplication of the ADA's companion section.<sup>116</sup>

Comparing the student petitioner to all other law students, instead of the general population, will also increase the petitioners' chance of success.<sup>117</sup> The consequent increase in potentially meritorious claims, like in *Bartlett*, can be justified by Congress's intent to level the playing field for disabled students and to cure labor force nonproductivity resulting from an inability to work.<sup>118</sup> If, on the other hand, law students are compared to the *average population*, and thereby face a more significant hurdle to the realization of their ADA rights, Congress's intent to offset economic nonproductivity would be stifled.<sup>119</sup> Any individual seeking an education should not be dissuaded from receiving such merely because he is disabled.<sup>120</sup>

### B. Comparison of Different Disabilities and Testing Accommodations

Courts and institutions granting testing accommodations should be sensitive to the particularity of each disability and provide specific accommodations for every student.<sup>121</sup> For instance, prior standardized test scores should not be used to determine whether a student claiming DWE has the disability, unless those

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115. See *infra* note 147 and accompanying text (finding support in congressional record).

116. See *Bartlett v. N.Y. State Bd. of Law Exam'rs*, No. 93 CIV 4986(SS), 2001 WL 930792, at \*37 (S.D.N.Y. Aug. 15, 2001) (applying EEOC Title I standard to Title III claim); *supra* note 66 (providing "rule of interpretation" rationale for application of Title I to Title III claim).

117. Compare *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 631-32 (6th Cir. 2000) (declining to apply Title I standard and rejecting petitioner's claim), with *Bartlett*, 2001 WL 930792, at \*37 (applying Title I standard and granting petitioner's request for accommodations).

118. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 933, 104 Stat. 327, 328-29 (codified as amended at 42 U.S.C. § 12101(a)(9) (1990)) (indicating Congress's observation of economic effect on United States economy resulting from powerless disabled class).

119. See *id.* (stating Congress enacted Act with purpose of comprehensively eliminating discrimination in all areas). The economic argument is meritorious because Congress enacted the ADA pursuant to its Commerce Clause Power. See U.S. CONST. art. I, § 8, cl. 3 (giving Congress power to regulate commerce among the several states); 42 U.S.C. § 12101(b)(4) (2000) (invoking its sweep of congressional authority). *But see Hunsicker, supra* note 3, at 3-4 (criticizing application of Title I standard and arguing for comparison to general population).

120. See 42 U.S.C. § 12181(7)(J) (2000) (evidencing Congress's intent to make education more available to disabled). Although this Note focuses primarily on testing accommodations during law school, the same challenges exist when seeking accommodations on the entrance exam, which controls admission and access to the school itself. See *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F. Supp. 2d 1093, 1095 (D. Colo. 2004) (requiring LSAC to release accommodated test scores to law school).

121. Compare *supra* Part II.C (detailing and comparing each learning disability), with *supra* Part II.D (explaining various accommodations requested). The accommodation granted should fit the disability claimed so as to minimize the impact on other affected constituencies. See *infra* Part.III.C (stating accommodations should differ depending on disability claimed); Weiss, *supra* note 1, at 233 (explaining accommodations affect other constituencies when granted).

tests required the student to write.<sup>122</sup> Prior standardized test scores, however, could support a claim of dyslexia or ADD/ADHD because they test the identical skills that are being claimed a disability.<sup>123</sup> Courts should be careful to recognize each disability as distinct, especially when analyzing the petitioner's multiple claims.<sup>124</sup>

Schools should never change the exam format or waive the general writing requirement because such accommodations would exceed Congress's intent in that the "playing field" would not merely be leveled, but instead, completely altered.<sup>125</sup> Furthermore, anonymity in the testing procedure might be compromised when forcing the professor to create a new exam for a particular student.<sup>126</sup> The law student's "ability to produce clear, concise written work" is one of the most defining aspects of the successful lawyer.<sup>127</sup> Accommodating a disability should not hastily circumvent one of the key faculties to be developed throughout law school.<sup>128</sup> Rather, law schools should encourage those students with inferior writing ability to take additional writing classes so as to further develop the faculties the legal profession demands.<sup>129</sup>

The most often granted accommodation—extended time—is the easiest and perhaps most controversial of all testing accommodations.<sup>130</sup> Extended time allows the student an extra opportunity to organize and process information when inhibited by a disability.<sup>131</sup> This accommodation, however, implicates

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122. See *supra* note 80 and accompanying text (noting individuals with DWE exhibit an inability to communicate through writing). Because multiple-choice standardized tests do not require the student to write, they are irrelevant as a means of determining whether petitioner suffers from DWE. *Id.*

123. Weiss, *supra* note 1, at 234 (exploring faculties tested by multiple-choice versus essay formats).

124. Cf. *Price v. Nat'l Bd. of Med. Exam'rs*, 966 F. Supp. 419, 423 (S.D. W. Va. 1997) (providing hasty and defective analysis). The court in *Price* concludes that the petitioner is not substantially limited in his joint claims of ADD/ADHD and DWE, resting its conclusion on prior standardized test scores. *Id.* This fails to account for the fact that standardized test scores and academic achievements may not have required the student to write, and therefore should be irrelevant to determining whether the student is limited in the DWE claim. See Weiss, *supra* note 1, at 247 (arguing for examining writing disability with flexibility).

125. See *supra* note 26 and accompanying text (explaining Congress's intent in assisting disabled as a class); see also Hunsicker, *supra* note 3, at 16-17 (arguing against waiver of writing requirement).

126. See Weiss, *supra* note 1, at 235 (recognizing compromised anonymity when professors must create new exam without writing requirement). This could also create a bias toward the student when grading the modified exam without a writing requirement. *Id.* at 235.

127. See Weiss, *supra* note 1, at 234-35 (noting good writing conducive to successful legal career). *But see id.* at 241-42 (arguing some in profession view writing skill as less important).

128. See Weiss, *supra* note 1, at 242 (arguing against waiver of writing requirement). The accommodation should not diverge significantly from the curriculum of other students. *Id.*

129. See Weiss, *supra* note 1, at 242 (arguing waiver of writing requirements disservice to all students and academic community). Andrew Weiss, a legal scholar who has a learning disability, notes that "perfection is hard to come by; even the most gifted writers make mistakes. Nevertheless, when expectations are overshadowed by indifference, the value of a law school education is compromised." *Id.* Whether the compromised legal education would affect the profession is explored in Part III.C. See *infra* Part III.C.

130. See Hunsicker, *supra* note 3, at 14 (arguing against extended time for law school examinations). Schools most often grant the extended time accommodation because it minimizes conflicts with other students. See Weiss, *supra* note 1, at 235.

131. See Weiss, *supra* note 1, at 235-36 (explaining rationale behind extended time accommodations).

other law student's interests and fuels their discord because they believe that extended time is an overly advantageous accommodation.<sup>132</sup> The institution granting the accommodation should closely scrutinize the student's disabled status and request for accommodation in order to avoid doling out an easier but less appropriate accommodation.<sup>133</sup> This is easier said than done, and one should make note of the risk in denying a student's accommodation request; namely, the threat of ADA litigation against the law school.<sup>134</sup> Nonetheless, law school administrations owe a duty to both disabled and non-disabled students to provide carefully considered and specifically tailored accommodations because it is mandated by federal law.<sup>135</sup>

### C. *The Various Affected Interests*

When a law school grants testing accommodations to a student, a variety of other interests are thereby implicated. For instance, other students might take issue with the school's registrar representing final grades and rankings without flagging the scores of students who took their examination under time-and-a-half accommodations.<sup>136</sup> While students adverse to exam accommodations argue that accommodations should not be granted, it is clear that such accommodations are clearly appropriate given Congress's intent in enacting the ADA legislation.<sup>137</sup> Their claim that end-of-year rankings should not be represented without acknowledging these accommodations, however, deserves more consideration.<sup>138</sup> One is again brought back to the burden placed on the school itself in that flagging the grades might controvert the purpose of the ADA and therefore be illegal.<sup>139</sup> At the least, schools should owe students a

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132. See *supra* note 102 and accompanying text (suggesting time most controversial accommodation because many view it as most critical factor during exam); see also *infra* Part III.C (discussing other interests implicated when test accommodations granted).

133. See Weiss, *supra* note 1, at 235 (suggesting extended time accommodations more common because they minimize student complaints and serve as quick-fix).

134. See 42 U.S.C. § 12101(b)(2) (2000) (providing standards to deal with discriminatory practices); Weiss, *supra* note 1, at 228, 229 (noting threat of losing American Bar Association (ABA) accreditation may render school less likely to provide non-traditional methods in accommodating disabled). Thus, law schools juggle pressure from Congress, the ABA, and students when accommodating the disabled.

135. See 42 U.S.C. § 12101(b)(2) (2005).

136. See *supra* notes 3-4 and accompanying text (noting fierce competition among students for first year grades); Michael Edward Slipsky, *Flagging Accommodated Testing on LSAT and MCAT: Necessary Protections of the Academic Standards of the Legal and Medical Communities*, 82 N.C. L. REV. 811, 817-18 (flagging accommodated test scores does not violate Title III of ADA).

137. See 42 U.S.C. § 12181(7)(J) (2000) (including postgraduate schools under umbrella of entities required to provide ADA accommodation).

138. See *Rothberg v. Law Sch. Admission Council, Inc.*, 300 F. Supp. 2d 1093, 1107 (D. Colo. 2004) (requiring LSAC to provide accommodated test scores to law schools); Slipsky, *supra* note 136, at 818 (arguing flagging accommodated test scores does not violate Title III of ADA).

139. See *Board to Stop Flagging Disabled's SATs*, CNN.COM, July 16, 2002, <http://cnnstudentnews.cnn.com/2002/fyi/teachers.ednews/07/16/flagging.sats.ap/index.html> (explaining board's decision to stop flagging scores due to threat of litigation). *But see* Slipsky, *supra* note 136 (arguing

duty during the initial phase of accommodation consideration to closely scrutinize requests for test accommodations, and perhaps appoint or train a particular entity or person to do so.

Employers may also have an interest in knowing whether potential employees received their grades under special circumstances.<sup>140</sup> Legal work calls upon a particular skill set, usually applied under stringent time standards, and disclosing the accommodation could affect an employer's decision concerning whether the particular applicant can perform these functions.<sup>141</sup> On the other hand, it might create possible prejudice during the interview process and, as a result, controvert the purpose behind the ADA.<sup>142</sup> Nonetheless, when an employer interviews various applicants and is provided with representations of performance presumed under similar circumstance, the grant of test accommodations might be a fact about which the employer wishes he or she knew.<sup>143</sup>

Providing test accommodations for some students may also have an effect on the legal profession as a whole.<sup>144</sup> Critics argue that granting such accommodations lessens the standards of the legal profession.<sup>145</sup> But given the inherent nature of academics, legal thinking, and educational and professional competition, standards will always be set high, and the great legal minds will always endeavor to achieve them.<sup>146</sup> Furthermore, qualifying disabled but otherwise able individuals as members of the bar will provide diversity in a class of attorneys more willing to advocate zealously for a variety of persecuted peoples and interests.<sup>147</sup>

#### IV. CONCLUSION

Exam accommodations for students claiming disabilities under the ADA are clearly warranted pursuant to both Congress's intent when enacting the legislation and judicial precedent that has resulted from such legislation. Law students who feel that no accommodations should be granted face an uphill and fruitlessly cynical battle against Congress's Commerce Clause Power, in

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flagging scores does not violate Title III).

140. See Hunsicker, *supra* note 3, at 15 (suggesting test accommodations may create false predictions of student's ability).

141. See Hunsicker, *supra* note 3, at 16-17 (noting effect on professional performance if institutions grant accommodations instead of focusing on improving skill set).

142. See Stone, *supra* note 3, at 570 (noting stigma and reluctance of disabled to request accommodations).

143. See Hunsicker, *supra* note 3, at 14-15 (suggesting test accommodations may create false predictions of student's ability).

144. See Hunsicker, *supra* note 3, at 15-16 (arguing test accommodations detrimental to quality of legal professional standards).

145. See Hunsicker, *supra* note 3, at 14-15 (arguing accommodations lower professional standards).

146. *But see* Hunsicker, *supra* note 3, at 15-16 (arguing erosion of educational and professional standards).

147. See 42 U.S.C. § 12101(a)(8) (2000) (indicating Congress's intent to assure equality of opportunity and remedy detrimental economic effect of a nonproductive disabled class).

addition to the wide plaintiff-oriented latitude afforded under the ADA. Any legal argument that accommodations should not be granted is highly unlikely to lead to any fruition. Rather, law students should accept the accommodations and concentrate on their own educational and professional objectives.

Law students, however, should expect and deserve a certain degree of consistency and candor from the law school administration, while trusting that the administration will provide maximum effort in granting the appropriate accommodations to disabled students. Law students who pay extremely high tuition and compete for grades cloaked in anonymity deserve, at the very least, an effort by the law school to ensure that the testing environment is most fair to all. For the law school, this means carefully considering each request for accommodation and providing an accommodation that is specifically tailored to that request. For instance, a student who receives above average marks on his mid-term examinations without an accommodation should not receive extended time during his final exam because he has already shown that his disability does not substantially limit him. In the event that this is the case, such an accommodation would be hastily unnecessary to the student, and fall short of the minimum expectations owed by the law school to other students. In addition, it would probably be inconsistent with the ADA and law school accommodation jurisprudence. Moreover, the student body should expect candid and consistent information concerning the law school's guidelines, policies, and procedures with respect to the examination process because the law school exam is the measuring device of one's legal education. Most likely, the quality and performance of one's law school education will ultimately serve to stratify his position within the professional hierarchy once he graduates.

Legal employers should have a right to know whether grades cloaked in anonymity were taken under exam accommodations. They should be provided with this information upon request simply because it is relevant to their hiring decisions. If the law school refuses to provide such disclosure, the employer should feel free to approach the law school's student talent with caution. In effect, this may ultimately damage the law school and its reputation among applicants and employers, as students attend law school for the prospects of gainful employment and employers recruit with the expectation of acquiring legal talent.

It is doubtful that exam accommodations erode professional standards. Certain accommodations, however, such as waiving the writing requirement, may be a detriment to the accommodated student's own legal education. Nonetheless, law students and legal academia will always progress, evolve, and build on the respectable legal minds which came before them. Evolution of the law and its legal thinking is the hallmark of the common-law tradition, and is an irreversible phenomenon so long as there is respect for it.

In conclusion, all the interests affected when ADA test accommodations are granted ultimately trace back to decisions made by the law school

administration. Perhaps the law school faces a highly difficult predicament of appeasing other interests when under this mandate by Congress. Such, however, is their own professional reality and merely one aspect of strengthening a school's reputation and history among the other ABA accredited law schools, all competing to introduce the best legal talent into a very competitive professional market where educational pedigree means much. Because this educational pedigree means so much in the legal profession, law schools should afford extreme attention in harmonizing the congressional and judicial mandate of the ADA and appoint special counsel to handle these requests as the frequency of requests multiply. When a law student, regardless of disability, enters a legal institution in furtherance of his legal career, he should look elsewhere if that institution cannot appropriately implement the ADA's mandate. Both the student body and such a school's ultimate reputation are jaded by its inability to effectively accommodate students with disabilities pursuant to the law.

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